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No. 99-1334

IN THE
Supreme Court of the United States

B.C. FOREMAN, IDA CLARK, OTIS TARVER, LOUIS DAVIS, and MANDY PESINA,
Petitioners,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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15pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. No Catalyst-Theory Plaintiff Could Satisfy the Fifth Circuit's Novel Test. 2

II. Respondents' Procedural Arguments Lack Merit. 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

1488, Inc. v. Philsec Investment Corp., 939 F.2d 1281 (5th Cir. 1991) 8

Aubin v. Fudala, 782 F.2d 287 (1st Cir. 1986) 3

Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 4

Church of Scientology Flag Service, Organization, Inc. v. City of Clearwater, 2 F.3d 1509 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994) 4

Citizens Against Tax Waste v. Westerville City School, 985 F.2d 255 (6th Cir. 1993) 4

Doty v. County of Lassen, 37 F.3d 540 (9th Cir. 1994) .. 4

Farrar v. Hobby, 506 U.S. 103 (1992) 3

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 693 (2000) 5, 8

Haley v. Pataki, 106 F.3d 478 (2d Cir. 1997) 4

Hewitt v. Helms, 482 U.S. 755 (1987) 3

Holmes v. Millcreek Township School District, No. 98-3428, — F.3d —, 2000 WL 215655 (3d Cir. Feb. 24, 2000) 4

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985) 3, 7

Johnson v. Lafayette Fire Fighters Association Local 472, 51 F.3d 726 (7th Cir. 1995) 4

Koster v. Perales, 903 F.2d 131 (2d Cir. 1990) 3

Little Rock School District v. Pulaski County Special School District, #1, 17 F.3d 260 (8th Cir. 1994) 4

Long v. Bonnes, 455 U.S. 961 (1982) 5

Marbley v. Bane, 57 F.3d 224 (2d Cir. 1995) 5

Paris v. United States Department of Housing & Urban Development, 988 F.2d 236 (1st Cir. 1993) 4, 6

Pembroke v. Wood County, 981 F.2d 225 (5th Cir. 1993) 4

Phelan v. Bell, 8 F.3d 369 (6th Cir. 1993) 4

Rose v. Heintz, 806 F.2d 389 (2d Cir. 1986) 7

S-1 & S-2 v. State Board of Education, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) 4

Schweiker v. Hogan, 457 U.S. 569 (1982) 8

St. Louis Fire Fighters Association v. City of St. Louis, 96 F.3d 323 (8th Cir. 1996) 4

Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995) 4

United States v. Raines, 362 U.S. 17 (1960) 8

Watkins v. Fordice, 7 F.3d 453 (5th Cir. 1993) 4

Wilderness Society v. Babbitt, 5 F.3d 383 (9th Cir. 1993) 4

Williams v. Hanover Housing Authority, 113 F.3d 1294 (1st Cir. 1997) 4

Zinn v. Shalala, 35 F.3d 273 (7th Cir. 1994) 4

MISCELLANEOUS

MARY FRANCIS DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES (1999) 2, 6

JAMES C. HUMES, THE WIT AND THE WISDOM OF ABRAHAM LINCOLN (1996) 2

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Although respondents congratulate the Fifth Circuit for "faithfully appl[ying] established catalyst theory principles," Resp. Br. at 8, the Fifth Circuit has actually eviscerated the catalyst theory. To paraphrase Abraham Lincoln's old saw about calling a dog's tail a "leg," respondents can call the Fifth Circuit's new test the "established catalyst theory," but just calling it that won't make it so.[1]

[1] Lincoln supposedly asked the riddle: "If you call a tail a 'leg,' how

(continued...)

Respondents thus are wholly unsuccessful in attempting to evade the central *substantive* problem raised by the decision below: In the wake of that decision, civil-rights plaintiffs in the Fifth Circuit (as well as the Fourth Circuit) can no longer recover attorneys' fees under the catalyst theory. Moreover, none of the diversionary *procedural* arguments raised by respondents refutes the compelling arguments for review raised by the Petition.

I. No Catalyst-Theory Plaintiff Could Satisfy the Fifth Circuit's Novel Test.

The traditional catalyst theory is clearly defined in the leading treatise on court-awarded attorneys' fees: "If a case *does not proceed to judgment on the merits* because it is mooted by the unilateral action of the defendant in providing *some measure* of the relief sought, the plaintiff is a prevailing party if [he] can establish that the suit was a 'catalyst' for the defendant's mooting of the suit."[2] Thus, the catalyst theory is available only in cases that become moot because the defendant capitulates *before* the court can enter final judgment on the merits.

But under the Fifth Circuit's radically revamped test, a plaintiff can prevail only by obtaining "*final* . . . merit-based relief." Pet. App. 15a (emphasis added); *see* Pet. at 9, 14-16.

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[1](...continued)
many legs would a dog have?" The answer: "Four. Calling a tail a leg doesn't make it so." JAMES C. HUMES, THE WIT AND THE WISDOM OF ABRAHAM LINCOLN 194 (1996).

[2] 1 MARY FRANCIS DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 8.03[2][a][ii][C], at 8-20 (1999) (emphasis added) (citing cases); *accord* 1 *id.* ¶ 9.02[4][c], at 9-21; 3 *id.* ¶ 34.03[3][a][ii][E], at 34-15.

And the "final remedy" obtained must be perfectly congruent with the relief the plaintiff requested in the complaint. Pet. App. 11a-12a, 15a; *see* Pet. at 9-10, 16-18.

These requirements on their face constitute a repeal of the catalyst theory as it has traditionally been understood. They would deny attorneys' fees regardless of the amount or type of voluntary compliance caused by a lawsuit – whenever that compliance prevented entry of a formal judgment in favor of the plaintiff giving the precise relief sought in the complaint.[3]

Not surprisingly, respondents fail to cite a single case in which a plaintiff could have recovered attorneys' fees under the Fifth Circuit's new test. Since this Court announced its decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), the Courts of Appeals have held that catalyst-theory plaintiffs were "prevailing parties" in 17 cases, spanning ten circuits over a

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[3] For the traditional view of the catalyst theory, see *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987) (If a lawsuit produces "a change in conduct that redresses the plaintiff's grievances . . . , the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.") (citing *Maher v. Gagne*, 448 U.S. 122, 129 (1980)); *Aubin v. Fudala*, 782 F.2d 287, 291 (1st Cir. 1986) (Breyer, J.) ("'[V]ictory' in a civil rights suit is typically a practical, rather than a strictly legal matter. . . . [W]hen a plaintiff's lawsuit acts as a 'catalyst' in prompting defendants to take action to meet plaintiff's claims, attorney's fees are justified despite the lack of judicial involvement in the result.") (citation and internal quotation marks omitted); *Koster v. Perales*, 903 F.2d 131, 134-35 (2d Cir. 1990) ("A plaintiff may be considered a prevailing party even though the relief ultimately obtained is not identical to the relief demanded in the complaint, provided the relief obtained is of the same general type."); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 912 (3d Cir. 1985) ("[P]laintiffs will be prevailing parties even though the relief they obtained is not identical to the relief they specifically demanded, as long as the relief obtained is of the same general type. . . . [T]he important thing is what relief was [actually obtained], not what relief was expressly requested by the pleadings.") (citation and internal quotation marks omitted).

seven-year period.[4] If those courts had applied the test that the Fifth Circuit enunciated below – rather than the traditional catalyst theory – the plaintiffs would have lost all 17 of those cases because *none* involved plaintiffs who had obtained a "final remedy" precisely matching their earlier prayer for relief.

As a practical matter, then, there is simply no difference between adopting the Fifth Circuit's new, so-called "catalyst theory" test and abolishing the theory outright, as the Fourth Circuit did in *S-1 & S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (*en banc*) (*per curiam*), *cert. denied*, 513 U.S. 876 (1994). The probability of a plaintiff recovering attorneys' fees on a catalyst claim is now the same in either circuit: precisely zero. Thus, this case squarely presents the primary question petitioners have asked the Court to resolve: whether the catalyst theory survived *Farrar*.

Respondents point to the Fifth Circuit's alternative holding that petitioners presented insufficient evidence of causation –

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[4] *Holmes v. Millcreek Township Sch. Dist.*, No. 98-3428, — F.3d —, 2000 WL 215655, *9-*10 (3d Cir. Feb. 24, 2000); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1297-300 (1st Cir. 1997); *Haley v. Pataki*, 106 F.3d 478, 482-84 (2d Cir. 1997); *St. Louis Fire Fighters Ass'n v. City of St. Louis*, 96 F.3d 323, 330-32 (8th Cir. 1996); *Stivers v. Pierce*, 71 F.3d 732, 751-54 (9th Cir. 1995); *Johnson v. Lafayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 730-31 (7th Cir. 1995); *Doty v. County of Lassen*, 37 F.3d 540, 547-48 (9th Cir. 1994); *Zinn v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Beard v. Teska*, 31 F.3d 942, 950-55 (10th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 262-63 (8th Cir. 1994); *Watkins v. Fordice*, 7 F.3d 453, 456-57 (5th Cir. 1993); *Phelan v. Bell*, 8 F.3d 369, 373-74 (6th Cir. 1993); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1509, 1513-14 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994); *Wilderness Soc'y v. Babbitt*, 5 F.3d 383, 386-89 (9th Cir. 1993); *Paris v. United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 239-42 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-58 (6th Cir. 1993); *Pembroke v. Wood County*, 981 F.2d 225, 230-31 & n.27 (5th Cir. 1993).

suggesting that this holding should serve to insulate from review the court's earlier effective repeal of the catalyst theory. *See* Resp. Br. at 6-8. But the *basis* on which the Fifth Circuit rejected petitioners' evidence only *heightens* the argument for review. The court held inadmissible the most direct evidence of legislative motive – affidavits of those involved – thus making it all but impossible to prove a catalyst claim in many situations. *See* Pet. App. 13a-14a. There is no doubt that, absent that unwarranted exclusion, petitioners' unrebutted evidence of causation was sufficient to justify a fee award. Indeed, the only two judges to have considered the full range of evidence – the District Judge and the dissenter in the Fifth Circuit – had no trouble reaching that conclusion. Pet. App. 21a-27a, 42a-48a.[5]

The bottom line is that, if the Court were to grant review, this case would provide an excellent vehicle both for resolving an acknowledged and glaring conflict over the validity of the catalyst theory, *see Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693, 711 (2000), and for clarifying the precise test the lower courts should apply, *see Marbley v. Bane*, 57 F.3d 224, 235 (2d Cir. 1995) (describing variations among the circuits' catalyst-theory tests); *see also Long v. Bonnes*, 455 U.S. 961, 962-67 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting from a denial

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[5] Respondents misleadingly suggest that the Fifth Circuit "looked at all the evidence in the record" before rejecting the District Court's finding of causation. Resp. Br. at 8. In fact, the court refused to give any weight to the affidavits and relied instead on the fact that a similar (though unsuccessful) bill had been introduced in a prior legislative session, before the lawsuit was filed. *See* Pet. App. 13a-14a & n.7. In so doing, as Judge Stewart explained in dissent, Pet. App. 24a-25a, the court was able to disregard the unrebutted sworn testimony that this lawsuit played a substantial role in the re-introduction and passage of the law that forced respondents to change their practices.

of certiorari) (same). Respondents' efforts to show otherwise are unavailing.

II. Respondents' Procedural Arguments Lack Merit.

Rather than address the central substantive point of the Petition – that the Fifth Circuit, like the Fourth, has dealt the catalyst theory a fatal blow – respondents offer a laundry list of procedural quibbles, each of which is inaccurate, irrelevant, or both.

First, respondents hint that, even if this Court granted certiorari, upheld the catalyst theory, and found that petitioners had obtained the relief they sought, it still would have to affirm the judgment below because petitioners could not prove a causal link between the lawsuit they filed against the County and the new statute enacted by the Texas Legislature. *See* Resp. Br. at 7-12. As noted, part of this argument depends on the incorrect assumption that the Fifth Circuit properly excluded from consideration the best evidence of causation – sworn testimony from the legislators involved. The other piece is respondents' assertion that there is something "novel," "unique[]," "expansive," or "unprecedented" about what they term the "*third-party* catalyst" theory. Resp. Br. at 8-9, 11.

In reality, however, petitioners' theory was quite conventional. When the actions of a third party moot a lawsuit, courts routinely order defendants to pay plaintiffs their attorneys' fees if "the suit was the catalyst for the actions of the third party and the defendant is in some sense bound by [the third party's] actions."[6] Thus, here, petitioners had every

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[6] 1 DERFNER & WOLF, *supra* note 2, ¶ 9.02[4][c], at 9-28 (citing cases); *see, e.g.*, *Paris*, 988 F.2d at 241 (holding that plaintiffs were eligible

(continued...)

reason to claim that their voting-rights suit was the catalyst for the Texas Legislature's enactment of the statute, which legally bound the County as a political subdivision of the State of Texas. Indeed, the facts here were even better than in some "third party" cases, because this case was not dismissed for mootness until *after* the County – a named defendant – finally abided by the precleared state statute (which had, by then, been in effect for several weeks), abandoned the 1996 election procedures that were the target of the lawsuit, and reappointed the six plaintiffs and several dozen other African-American and Hispanic election judges. *See* Pet. App. 6a & n.3, 38a & n.3.

Second, respondents attempt to separate the Fifth Circuit's discussion of the TRO, and its requirement of a "final remedy," Pet. App. 15a, from the court's discussion of the catalyst theory. Resp. Br. at 5. But the District Court had held that the TRO was a "significant catalyst" in causing respondents to rescind their unprecleared September 1996 procedure for selecting election judges. Pet. App. 39a. The Fifth Circuit reversed that ruling on the ground that preliminary relief cannot, in principle, create a prevailing party because it is not a "final remedy" altering the "'legal relationship'" of the parties, Pet. App. 15a (quoting *Farrar*, 506 U.S. at 111) – even where, as here, the TRO caused the permanent abandonment of

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[6](...continued)
for fees because their litigation efforts caused Congress, a nonparty, to alter the defendants' challenged tenant-selection policies); *Rose v. Heintz*, 806 F.2d 389, 389-92 (2d Cir. 1986) (reversing a denial of attorneys' fees because plaintiffs' motion for a preliminary injunction led the Federal Government to change its policy, which in turn forced the defendant state agency to change *its* policy and thereby moot plaintiffs' lawsuit); *Institutionalized Juveniles*, 758 F.2d at 917 (rejecting "defendants' argument that the law's changes . . . were not attributable to them because the changes were enacted by the [Pennsylvania] legislature," which was not a party to the lawsuit).

one set of allegedly illegal practices. *See* Pet. App. 19a, 27a. A clearer rejection of the catalyst theory is hard to imagine.

Third, respondents assert that petitioners are procedurally barred from placing any reliance on their victory in the prior Supreme Court phase of this case – a phase in which petitioners won a total vindication of the principle that changes in the method for selecting election judges are subject to preclearance. Pet. App. 32a-33a; *see* Pet. at 5, 17 & n.8. The claim is that, because the District Court did not rely on this ground, and because petitioners did not cross-appeal, they are barred from raising this point now. Resp. Br. at 2, 6. That argument is simply wrong. Petitioners were declared "prevailing parties" and were awarded every dime of fees they had requested, Pet. App. 48a-49a, and were thereafter entitled to raise any available alternative theory to support that judgment.[7]

Fourth, respondents suggest that this case resembles *Friends of the Earth*, 120 S. Ct. at 711-12, in that both are flawed vehicles for resolving the circuit split on the catalyst theory. *See* Resp. Br. at 4, 12. That comparison is inapt. In *Friends of the Earth*, the district court had neither denied nor awarded any attorneys' fees. *See* 120 S. Ct. at 712. Here, by contrast, the District Court granted the petitioners' motion for fees in full, Pet. App. 49a, and the appellate court reversed that

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[7] *See United States v. Raines*, 362 U.S. 17, 27 n.7 (1960) ("[S]ince the judgment of the District Court awarded appellees all the relief they requested (despite rejecting most of their contentions, except the central one), no cross-appeal was necessary . . . ."); *see also Schweiker v. Hogan*, 457 U.S. 569, 585 & n.24 (1982) (allowing appellees to assert an argument as a basis for affirming the district court's judgment, even though they had neither advanced that argument below nor filed a cross-appeal); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1292 n.7 (5th Cir. 1991) (explaining that an appellee in the Fifth Circuit may advance arguments the district court rejected).

award outright (and even refused to remand the case), Pet. App. 2a.

Fifth and finally, respondents rely on the fact that there was never a final adjudication that their challenged methods for selecting election judges were discriminatory or that the second of those challenged methods actually required preclearance. Resp. Br. at 13-15. But those facts are, of course, irrelevant. If the catalyst theory is valid, it is sufficient that petitioners made these allegations and caused respondents to abandon the challenged practices.

CONCLUSION

The Court should grant the petition for a writ of certiorari to determine whether respondents, and the Fifth Circuit, are correct that defendants can avoid fee liability by unilaterally mooting a case before a final adjudication of liability can be entered.

Respectfully submitted,

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